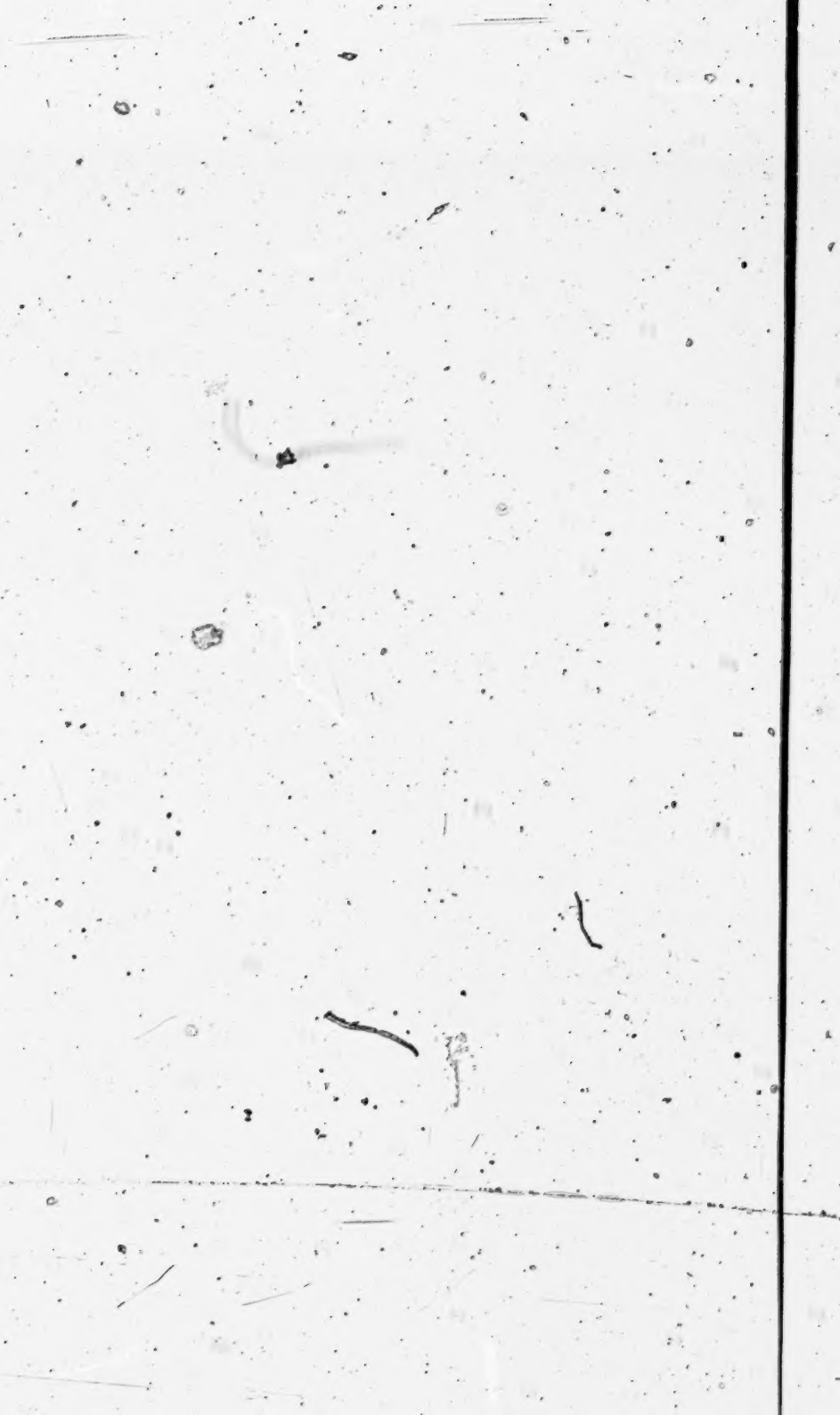

No. 72.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

MRS. JULIA CAROLINE SPONENBARGER et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF

Of Respondents Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank in St. Louis.

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INDEX.

Cases Cited.

Statutes Cited.

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Of Respondents Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank in St. Louis.

STATEMENT OF THE CASE.

THE TECHNICAL SITUATION.

This is an action under the Tucker Act, 28 U. S. C. A., Section 41 (20), for compensation to plaintiff for the taking of an easement in land by the Government in the prosecution of the Mississippi River Flood Control Work. The sole original plaintiff, Mrs. Julia Caroline Sponenbarger, a respondent herein, is the fee owner of forty acres of farm land in which the easement is alleged to

have been taken. The United States, petitioner herein, was the sole original defendant.

Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank in St. Louis, with others, were made additional parties on motion of the Government, which alleged that they claimed an interest in the land. By order of the Court granting the motion of the Government, they were specifically named by the Court as additional parties "plaintiff," although it is their understanding that additional parties thus brought in involuntarily by order are normally designated as "defendants." This designation of the additional parties as "plaintiffs" may have produced some anomalies. Their interest is adverse to that of the original plaintiff with respect to the ownership of the land and the proper disposition of any award that may be made for the taking of the easement. Their interest is identical with that of the original plaintiff with respect to the existence of a claim against the Government.

The trial court found for the Government and made no finding concerning the respective rights of the original plaintiff and the additional parties.

Appeal was taken by the original plaintiff and the additional parties. The additional parties deemed it necessary to participate in the appeal, as parties appellant rather than appellee under the rules governing appeals, because, having been forced involuntarily into the litigation as "plaintiffs" and so compelled to assert herein their claim against the Government, they did not want to hazard the technical possibility that the judgment below in favor of the Government and against them, although reversed on appeal of the original plaintiff, might be final against them in the absence of participation herein. However, the dispute between these additional parties and the original plaintiff was not a subject matter of the appeal. The ap-

peal relates solely to the cause of action against the Government, whoever may be the proper party to assert it.

The Court of Appeals reversed the trial court. The Government petitioned this Court for writ of certiorari, which was granted. It is assumed that Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank in St. Louis are respondents, although they seem nowhere named. (See petition for writ, p. 3, especially the note, and brief for the United States, p. 3, especially the note.) The technical disposition made herein of them may be important.

Prior to the filing of the present suit the Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank had asserted their claim against the Government in cases now pending in the Court of Claims of the United States. Their actions in the Court of Claims covered all of the land in the Boeuf River Basin and they are not voluntarily taking up their claims with reference to an individual "forty."

THE GENERAL FACTS.

Mrs. Sponenbarger is filing an exhaustive brief and any repetition herein of details available in that brief will be avoided.

The general theory on which the present action and the actions in the Court of Claims are based is that the Government has taken an easement for a floodway across the Boeuf River Basin, thereby subjecting the land to a servitude which diminished its value, and compensation must be paid. The essential facts are simple. (Transcript pages cited are only illustrative. This statement is too general to permit detailed reference to the transcript.)

Below Cape Girardeau, the Mississippi River and the lower reaches of the tributaries of the Mississippi River

flow through an alluvial basin. Some of this alluvial basin is sufficiently high to be safe from floods, but most of it, except for artificial works, is subject to overflow. The size and location of the area overflowed, of course, varies with the size and location of each particular flood. The source of a flood, ordinarily, is one or another of the tributaries, and extreme floods on the Mississippi River itself are due to simultaneous floods originating on more than one tributary. (For possibly the best single statement of the physical situation, see House Document 90, 70th Congress, First Session, December 1, 1927, Exhibit 2, R. 119.)

Throughout the history of the Mississippi Valley, constantly increasing efforts have been made by local interests to protect particular portions of the alluvial basin from floods by means of levees. An attempt has been made over a considerable period of more recent years to co-ordinate these efforts through the Mississippi River Commission, which was created by the Federal Government. The general thought was that a system of local, although sometimes extensive, levees, constructed and operated by levee districts within the several states, if the construction and operation of the levees were co-ordinated through the good offices of the Mississippi River Commission, would ultimately result in complete flood protection for the whole alluvial basin.

The Mississippi River Commission finally worked out grades and sections for levees for the whole Mississippi alluvial basin, known as the 1914 grade and section, which it recommended to all local levee districts as sufficient for complete flood protection, and by 1927, by various devices, including federal aid, had accomplished much in persuading local levee districts to attain this ideal. (See House Document 90, R. 119, although a better statement of the history is to be found in the decisions of this Court cited in these proceedings.) It should be stated at this point that there always has been, and still is, considerable doubt

in the lay mind as to whether complete flood protection is desirable, let alone possible. A contrary view prevails in connection with the Nile Valley.

One of the disregarded, if not wholly unanticipated, effects of the efforts at flood control showed itself in the flood of 1927. This was an unprecedented flood. It was unprecedented, at least in part, because the levees built for protection purposes confined the river to a relatively narrow flood area and so raised the flood height and velocity, and correspondingly increased its destructive effect (R. 122, Secs. 76 and 77).

The 1927 flood secured general approval of the notion that Mississippi River floods were a matter for control, and for control by the Federal Government, rather than for control by local levee districts. The notion that control is a matter for the Federal Government is based partly on the magnitude of the undertaking, which calls for financing beyond the ability of local districts, or even of individual states. It is based partly on the physical fact that the problem transcends state boundaries and can be handled as a unit only by some authority coextensive with not less than half a dozen states (R. 121, Sec. 39). It is a fact, not logic, that no association of the states involved, along the lines of the association of states in connection with the Colorado River, has received serious consideration. Logic suggests as at least one possibility a levee and drainage district, coextensive with the area subject to floods, with the customary assessment of benefits and damages within the whole district. One virtue of such a district would be that it would solve the present problem along accepted lines and would compensate those damaged.

Two general schools of thought as to the proper method of flood control by the Federal Government developed. One of the prevalent schools of thought, the tenets of which became embodied in the Jadwin Plan (House Document 90, R. 119) and then became enacted into the law which is

at the basis of this litigation (Flood Control Act of May 15, 1928, R. 118), holds that most of the alluvial valley can and should be protected from all but extreme floods by levees, and that a large part can and should be protected even from extreme floods by providing for the overflow of extreme floods into controlled and limited special districts.

The other school of thought, the tenets of which ultimately have become generally known as the Markham Plan, is not voiced in any single official document in complete form. Various expressions appear in different official documents since General Markham has sueceeded General Jadwin, and certain portions of the Markham Plan have been enacted into law, the most significant law for present purposes being the Overton Bill (Flood Control Act of June 15, 1936, R. 154). Officially, the Jadwin Plan is still the adopted plan, and the Markham Plan is being followed, partly with express authority of law and partly under the general powers of the War Department, only in an experimental way. The tenets of this second school of thought hold that the overflow provided for in the Jadwin Plan probably can and should be largely prevented by a series of works which would include such things as reforestation and the checking of soil erosion, to restore, at least in some degree, what is conceived as a natural condition of slow precipitation runoff, and two types of work of more direct interest in the present suit, to wit, retention reservoirs which would hold water in the upper reaches of the tributaries with a controlled outlet to the Mississippi River, and continuous work straightening and stabilizing the channel of the Mississippi River itself by means of cutoffs and other work to speed up river runoff.

The second school of thought was in existence at the time the Jadwin Plan was formulated, and the series of works contemplated by the second school of thought was expressly rejected and the overflow areas were adopted in the Jadwin Plan on the ground that the expense of the

series of works would be prohibitive and that, regardless of expense, they would be inadequate. (See House Document 90, R. 119.)

The Boeuf River Basin was selected in the Jadwin Plan as one of the overflow areas. It is admirably adapted for that purpose (R. 124, Sec. 119). It is on the west side of the river in Arkansas, opposite a much larger alluvial area in Mississippi, which Mississippi area was in fact flooded in the 1927 flood because of levee failure. The Boeuf Basin is a portion of the general Mississippi River Basin lying between the Macon Ridge, an alluvial ridge parallel to the Mississippi River, high enough that it has not been flooded in historical times, and the true hills farther west of the river. The Boeuf River is really a bayou which ties in with the Mississippi system both at its top and its bottom. The Jadwin idea was that the levee at the head of the Boeuf Basin, high enough to keep out ordinary high water but not extreme floods, with higher levees elsewhere, would sacrifice that smaller Arkansas Basin for the benefit of the much larger area in Mississippi, and, by way of general relief, other areas from Cape Girardeau to the Gulf—provided construction and operating work was directed at insuring that the Boeuf Levee would go before other levees were threatened. A subordinate idea was to protect part of the Boeuf Basin itself, and especially bottoms leading into the Boeuf Basin, by side levees, sometimes called "guide levees" because they would confine the overflow to the more central part of the Boeuf Basin.

The devices adopted in the Jadwin Plan to insure the sacrifice of the Boeuf Basin for the benefit of the general Mississippi Basin consist primarily of a prohibition against the raising or strengthening of the portion of the Mississippi River levee across the head of the Boeuf Basin, with provision for blowing it at the critical stage if it should not go on account of its weakness, coupled with the raising and strengthening of all other levees.

The construction of the Boeuf Spillway involved (1) the raising and strengthening of adjoining levees, by intent and in fact specifically as part of the Boeuf Floodway, although also functioning as part of the general flood control works; (2) the leaving of an unraised, unstrengthened section, the "fuse plug"; (3) the construction of guide levees, partly to extend the northern raised and strengthened levees southward to confine the spillway to the Boeuf Basin proper, partly to confine the spillway to the central part of the Boeuf Basin. Of this work, the adjoining levees have been raised and strengthened, except as noted in the next sentence. The unraised, unstrengthened levee is longer than it would be after junction of the raised and strengthened levees with completed side levees. The side levees went as far as action for condemnation of the right of way, later abandoned, but have not been constructed. The present physical situation is such that the unraised, unstrengthened levee does function as a fuse plug and the Boeuf Basin is a spillway, although the flooded area would be much larger than originally contemplated. Plaintiff's land has been "interfered with" in the same manner and to the same degree as though the project were fully completed.

So far, a kind Providence has refrained from sending an excessive flood to the Boeuf River area, so that it has never actually been used as a spillway, although the corresponding New Madrid Spillway unfortunately has been put to use and, when its levee did not go out quickly enough to satisfy the federal authorities, it was blown. There is a possibility that the Boeuf River Spillway may never actually be used and for that matter, that the New Madrid Spillway may never again be used, provided experiments with the works contemplated by the Markham Plan and others as yet unthought of lead to conclusions which result in the adoption of those works, provided

appropriations are secured and the works constructed, provided they prove as efficient as hoped, provided appropriations are actually made for the continuous channel work which is an essential part of the plan and provided all this is done before an excessive flood occurs. However, the Government engineers estimate that the Boeuf Spillway will be used on the average of once in twelve years (R. 124, Sec. 119).

The above statement involves negation of recitals in the statement in the brief for the United States as follows:

The brief for the United States recites that the Boeuf Basin "is part of a larger basin known as the Tensas Basin." Without discussing the abstract geographical question, the Boeuf Floodway lies west of the Macon Ridge, between the Ridge and the true hills, and the Eudora Floodway proposed in the Flood Control Act of 1936 lies east of that Ridge. The two overlap only to a small extent above and below the Ridge, due to the fact that proposed guide levees for the two are not identical. Plaintiff's farm happens to lie north of the Ridge in such a position that if guide levees are placed precisely where proposed, it will lie in both floodways.

The brief for the United States mentions "the natural highwater bed of the Mississippi River." Common knowledge and the law recognize three river levels: the normal bed of the river, the highwater bed, which includes sloughs and the like, and the flood area. The flood area is not part of the bed of the river at all. A river floods when it gets out of its bed. The Boeuf Basin and the Tensas Basin are not, as stated by the Government, "in the natural highwater bed of the Mississippi River." They are part of its flood area.

The brief for the United States recites that the Boeuf Basin "was always subject to the servitude of flooding." That basin and no part of the Mississippi Basin was "sub-

ject to a **servitude** of flooding," prior to the Flood Control Act. In the course of nature the flood area of the river, including the Boeuf Basin, was subject to periodic inundation, but **servitudes** for floodways were first created by the Flood Control Act.

The brief for the United States recites "The land was flooded in 1912, 1913, 1919, 1921 and 1922 and in 1927." The land has been flooded from time immemorial but the reference to specific floods is misleading, for it was only after 1927 that the Arkansas River Levee was built and the land protected from all sides.

The brief for the United States recites "the lands in the floodways retained the same measure of protection they had theretofore enjoyed." In the form in which made, as applicable to all of the "floodways" created by the Flood Control Act, the recital is not remotely accurate. As applicable specifically to the Boeuf Floodway, it is true that in certain particulars, specifically in connection with ordinary high water, the Boeuf Floodway retained the same measure of protection it had theretofore enjoyed, but it is equally true that in other respects, specifically in connection with extreme floods, all right of protection was withdrawn by the act. The Government took the right, both in connection with the construction of flood control works and in connection with the operation of flood control works after they were constructed, to take whatever steps might be necessary to insure that, in extreme floods, the Boeuf Basin and not other areas would be flooded, thus withdrawing all protection from the Boeuf Basin. This included the right to blow the Boeuf Basin Spillway Levee, a right which already has been exercised in connection with the analogous New Madrid Spillway Levee.

The brief for the United States recites "the Jadwin Plan was only tentative." The fact is that the plan, as embodied in House Document 90, was enacted into law in the Flood Control Act of 1928.

The brief for the United States recites that Congress "did not adopt all features of the plan, especially in view of the engineering differences between it and a plan submitted by the Mississippi River Commission." It goes on to say that these differences were referred to the Mississippi River Flood Control Board. The fact is that, on recommendation of this board, all of the Jadwin plan was adopted and the proposals of the plan submitted by the Mississippi River Commission were rejected.

The brief of the United States says, "The Boeuf River Floodway * * * was never begun, 'due to local opposition' and an injunction." The injunction was denied. "Local opposition" may not nullify the provisions of the Flood Control Act. It is not a statement of fact, but is a conclusion of mixed law and fact to say that the Boeuf floodway was never begun and the conclusion is one of the major points in controversy.

The brief for the United States recites that "**Thereafter,** pursuant to the **general authority** of the Mississippi River Commission, **independent of the 1928 act,** the levees on the south side of the Arkansas River were reconstructed * * *. Moreover, by means of cut-offs, the Mississippi River was shortened by one hundred miles." These independent facts are true but immaterial. Similarly the brief of the United States recites, "Congress abandoned that part of the plan of the 1928 act which affected the Boeuf Floodway and, in lieu thereof, has created the Eudora Floodway. The Boeuf Floodway is no longer considered a part of the plan for flood control." This recital is neither true nor material. The Eudora Floodway was to be substituted for the Boeuf Floodway under the provisions of the Act of 1936, only under specified conditions. These conditions proved impossible of accomplishment and the Eudora Floodway has not been and can never conceivably be substituted for the Boeuf Floodway. Not only was the Boeuf Floodway begun, the law requires its completion. All of

the statements are immaterial. If, as contended by respondents, the Boeuf Floodway was not merely a project, but was actually 90 per cent constructed, the abandonment, not of the mere proposal of a Boeuf Floodway, but of an actual existing Boeuf Floodway, cannot relieve the Government of its obligation to compensate for the taking of the Boeuf Floodway.

The brief for the United States recites: "The construction of cut-offs and channel stabilization and the reconstruction of the levees on the south bank of the Arkansas River have resulted in a greater protection and security to respondents' land than it ever before had * * *. No additional servitude has been placed upon respondents' land." If it were true that the Government had taken the Boeuf Floodway and then later had succeeded in adopting devices which obviated the necessity for its use as a floodway, the facts might suggest that it would be exacting the "pound of flesh" to insist on payment for the floodway after it had ceased to be used as such. However, in addition to the fact that the Arkansas River and the channel work were independent of and subsequent to the creation of the Boeuf Floodway, the channel work is solely experimental, anticipated benefits are in the face of past experience and whether it will be permanently beneficial is speculative. In any event land values in the Boeuf Floodway have not yet recovered on the strength of the channel work. The Arkansas River levee is helpful in connection with Arkansas River floods and even in connection with backwater from Mississippi River floods, but it has no effect whatever on the use of a portion of the Mississippi River levee as a fuse plug. The record shows that additional protection against ordinary highwater, such as that afforded by the Arkansas levee, is being given the Boeuf Floodway from time to time, but the record also shows that the Boeuf Floodway is subjected to the servitude created, not by nature, but by the Flood Control Act, that all flood control

works shall be so constructed and shall be so operated as to insure that it is the Boeuf Floodway and not other areas which shall carry excess flood water which cannot be carried in the leveed flood area. Further, the record shows that once the fuse plug has gone out or has been blown pursuant to the plans of the Government, the Boeuf Floodway will be wholly without protection, and protection, even against ordinary highwater, can be re-established only if the Government reconstructs the levee. There is no provision in law for such reconstruction. The War Department indicates that it is its intention to try to get the necessary funds to reconstruct when necessary, but that is a matter of grace which has no bearing on the original taking, except as it might tend to limit the drop in market price of the land due to the taking.

THE INTEREST OF THESE RESPONDENTS.

A considerable portion of the testimony in the present case concerns the amount of compensation for the Sponenbarger "forty." For the present purposes of these respondents it is sufficient to say that the testimony disclosed that the creation of the Boeuf Floodway did, in fact, result in at least some decrease in the market value of the Sponenbarger "forty." This fact stands out after all due allowance is made for the fact that the depression followed within eighteen months and tends to obscure the situation. It stands out after a consideration of the testimony of individual witnesses about elements tending to raise or decrease the market value, none denying that the market value did decrease.

The primary concern of these respondents is that they be so disposed of in the present appeal that they not be eliminated from consideration as possible "owners" of the land, provided the cause of action against the Government

is sound and compensation is awarded the owners of the land.

While Mrs. Spoenenbarger is the fee owner of the particular "forty," she does not own it free and clear. Among other incumbrances, running into millions of dollars, this "forty," together with the whole of the lands in the Boeuf River basin, in which like easements were taken, at the time the suit was filed, was subject to the lien of the following bond issues, in which these respondents are interested (R. 291-297):

1. Southeast Arkansas Levee District, October 1, 1919, Mercantile-Commerce Bank and Trust Company, Trustee, $490,000.00.

2. Southeast Arkansas Levee District, March 1, 1921, Mercantile-Commerce Bank and Trust Company, Trustee, $400,000.00.

3. Southeast Arkansas Levee District, March 1, 1923, Mercantile-Commerce National Bank, Trustee, $285,000.00.

4. Southeast Arkansas Levee District, November 1, 1924, Mercantile-Commerce National Bank, Trustee, $282,000.00.

5. Southeast Arkansas Levee District, March 1, 1926, Mercantile-Commerce Bank and Trust Company, Trustee, $100,000.00.

6. Southeast Arkansas Levee District, January 1, 1927, Mercantile-Commerce Bank and Trust Company, $334,000.00.

To secure these bond issues, the particular "forty" was subject to a lien of an annual tax of 30 cents per acre per year in favor of the Southeast Arkansas Drainage District to secure its bonds until its bonded debt is paid. The other lands in the Boeuf River basin are subject to similar liens (R. 4-81, 291, 297).

SPECIFICATION OF ERROR.

The trial court erred in the conclusion on which it based its judgment, the conclusion being worded in the opinion of the trial court as follows:

> "In our opinion it cannot be successfully contended that plaintiff's land has been appropriated by the defendant, thereby giving rise to implied contract to compensate the owner."

POINTS AND AUTHORITIES.

1.

The trustees are proper parties to this action and were properly brought in by the Government, inasmuch as plaintiff had not made them parties in the beginning.

Hurley v. Kincaid, 285 U. S. 95;
Jacobs v. United States, 290 U. S. 13;
Flood Control Act, Title 33, Section 702-b, U. S. C. A., Title 40, Sections 257 and 258, U. S. C. A., Title 33, Section 591, U. S. C. A.;
Crawford & Moses' Digest of the Statutes of Arkansas 1921, Section 3930;
Crawford & Moses' Digest of the Statutes of Arkansas 1921, Section 3932;
Hare v. Fort Smith & Western Railroad Company, 104 Ark. 187;
Schichtl v. Home Life & Accident Co., 169 Ark. 415;
Missouri and North Arkansas Railroad Co. v. Chapman, 150 Ark. 334;
Acts of Arkansas 1917, Sections 10 and 11 of Act No. 83.

2.

The creation of the Boeuf Floodway on its face seems obviously a taking of an easement in the land of the Boeuf Basin. It accordingly probably will be most helpful to negative the points advanced as arguments that it did not constitute a taking. The position of these appellants is that the creation of the floodway constituted a taking of an easement by the Government, and the creation of a servitude on the land in the Boeuf Basin, in such a sense that just compensation is payable by the Government under the common-law rule and under the constitutional provision that the Government must pay just compensa-

tion for property taken for public purposes. This is so notwithstanding the following:

1. It was an easement, not the fee, which was taken. This includes the idea that permanent possession was not taken, but merely the right to occasional possession.

2. No flood has as yet happened and so the right to temporary possession under the easement has not, in fact, yet been exercised.

3. Engineering progress subsequent to the taking may ultimately justify the future abandonment of the floodway.

4. Economic and other developments subsequent to the taking may have caused fluctuation in the market price.

5. The Overton Bill makes possible the substitution of the Eudora for the Boeuf River Spillway, that substitution not having been made and by now having proved practically impossible.

6. The essence of the taking consists of the creation of a system which intentionally sacrifices the interest of the Boeuf Basin landowners for the good of the greater number of the Mississippi Alluvial Valley landowners and for the good of the United States as a whole. This is especially true in that the method to accomplish the purpose includes not merely the construction of levees elsewhere, but includes, also, first, depriving the Boeuf Basin landowners of their common-law right, which is part of their property in their land, to protect themselves by strengthening and raising their own levees, and, second, includes the construction and operation of the whole Mississippi Valley Levee system by the Government in such manner as to insure that all future Mississippi River floods will flood the Boeuf Basin and not other portions of the Mississippi Alluvial Valley.

The cases are all cited in Mrs. Sponenbarger's brief and will not be repeated here.

ARGUMENT.

POINT 1.

These appellants are not parties to this proceeding of their own volition, having in the first instance filed their claims in the Court of Claims, the tribunal of their own choice. The primary interest of these appellants in this proceeding is that any decree which may be entered be properly worded with reference to them so that the real intention of the Court with regard to them may be accomplished and their interests protected.

The essential nature of the claims of the owners of any interests in the property taken is the same as if the action were an action by the Government for the condemnation of the property. Hurley v. Kincaid, 285 U. S. 95; Jacobs v. United States, 290 U. S. 13.

The Flood Control Act, Title 33, Section 702-b, United States Code Annotated, provides for the acquirement of lands and easements by condemnation by the Secretary of War. The said act does not set forth the procedure further than that the action shall be instituted in the District Court in which the land or easement is located, and that the Court shall appoint three commissioners to ascertain the value of the property and assess the compensation to be paid. There are, however, general statutes which require the procedure to be the same as the practice, pleadings, forms and modes of proceedings of the courts of record in the state within which the District Court is held, where condemnation is instituted by the Secretary of the Treasury or any other officer. Title 40, Sections 257 and 258, United States Code Annotated. Another general statute requiring condemnation proceedings by the United States to conform to the law of the state where the pro-

ceedings are instituted is Title 33, Section 591, United States Code Annotated.

A statute of the State of Arkansas gives to the owner of property the right to recover damages when his property has been appropriated by a corporation authorized by law to appropriate private property for its use. Section 3930, Crawford & Moses' Digest of the Statutes of Arkansas 1921, is as follows:

> "Whenever any corporation authorized by law to appropriate private property for its use shall have entered upon and appropriated any property, real or personal, the owner of such property shall have the right to bring an action against such corporation in the circuit court of the county in which said property is situated for damages for such appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefor, would be barred by the Statute of Limitations."

And a statute of Arkansas gives to the defendant in any such action the right to bring in all parties who have an interest or claim to have an interest in the property in controversy. That statute is Section 3932, Crawford & Moses' Digest of the Statutes of Arkansas 1921, and it reads as follows:

> "Proceedings instituted under this act shall be governed by the rules of pleading and practice prescribed for the government of proceedings in the circuit court. The defendant shall have the right to bring in all parties having or claiming an interest in the property in controversy, and the court shall make the proper orders of the distribution of the compensation recovered in the action among such parties as may be entitled thereto, and shall include in the judgment in said proceedings an order condemning said property

for the public use to which it may have been appropriated."

And in condemnation proceedings the Supreme Court of Arkansas has frequently held that all persons owning an interest in the property are proper parties. Hare v. Fort Smith & Western Railroad Company, 104 Ark. 187; Schichtl v. Home Life & Accident Company, 169 Ark. 415; Missouri and North Arkansas Railroad Company v. Chapman, 150 Ark. 334.

The act creating the Southeast Arkansas Levee District (Section 10 of Act No. 83 of the Acts of Arkansas for the year 1917) makes the tax levied by the Legislature a lien on all of the property in the district. Said section reads as follows:

"The taxes herein levied shall constitute a lien, and are a lien on all of the property in said levee district, against which they are assessed, * * *."

Section 11 of said act, in part, provides as follows:

"The board is hereby required to set aside annually from the first revenues collected from any source whatever, a sufficient sum to pay the interest for the year on all outstanding notes, certificates and bonds, and any notes, certificates and installments of bonds that may become due in the year, and for the purpose of securing the payment of said notes, certificates and bonds and interest, a lien is hereby charged on all lands, lots, railroad embankments and tramways, and all other property in said district subject to levee tax paramount to all other liens. For the purpose of paying said notes, certificates and bonds and interest said board may execute an instrument of pledge in due form of law."

Some courts have held that, where property is damaged only but not taken in fee, the mortgagee is required to

show that the value of the remaining property is not sufficient security before the mortgagee can assert any rights. Some cases to that effect have been cited by the original plaintiff in her brief in the courts below and probably will be cited in this court. These cases are not in any wise applicable here for two reasons: First, the overwhelming weight of evidence is to the effect that, after the beginning of the flood-control project by the Government, plaintiff's land had a value of not more than $10.00 or $15.00 an acre, which is less than the liens against the land, whereas it was of the value of $125.00 an acre immediately preceding the beginning of the work by the Government; second, the question of the amount of liens against the land and its relation to the value of the land has not yet been inquired into and the time for discussing the point has not arrived.

The lien against the land in which these respondents are interested is 30 cents an acre per year in favor of the Southeast Arkansas Levee District, until its indebtedness is paid, to secure an aggregate indebtedness of $1,891,000, with interest from March 1, 1932.

POINT 2.

A very extensive field is properly to be considered in deciding this matter. It is perhaps not inappropriate that the Court, in view of the importance of the issues, should give consideration to the whole field and should express itself quite generally.

These respondents, however, conceive that the truly critical point is a definite and simple one, which may be stated as follows:

The Government has deprived the Boeuf Basin landowners of property, to wit: Of certain of the attributes of their property rights in the land in the Boeuf Basin, by

designing and constructing a levee system deliberately intended to sacrifice the Boeuf Basin lands for the benefit of a much larger group and for the public good and, among other things, has deprived the Boeuf River landowners of that particular attribute of their property which consisted of their common-law right to protect their lands against floods by raising and strengthening their protective levees and by giving the Government the right to sacrifice even the existing levees when necessary to accomplish the general purpose. These respondents are not contesting the wisdom of the plan nor the right of the Government to adopt it, but are only insisting that the few who are sacrificed for the benefit of the many be compensated either by the many or at public expense.

The Government, in turn, is not denying that compensation should be paid if there were a taking, but denies that there was a taking, purports to doubt the probability of any physical damage to the lands on the theory that the floodway will probably never be used and contends that if there has been any diminution of the market value of the lands in the Boeuf Basin that comes under the head of consequential damages.

If, following the crevassing of the levee in the 1927 flood, **the local Levee District** in Mississippi had repaired, raised and strengthened its levee with the result that unless the Arkansas Levee District did the same thing Arkansas, and not Mississippi, would be flooded by the next flood, doubtless there would have been some decrease in the market value of the Arkansas lands and that decrease would be in the nature of a consequential damage and not actionable. The crux of the matter is that **the Government** repaired, strengthened and raised the Mississippi levee as part of a plan deliberately to sacrifice Arkansas for the benefit of Mississippi and other states and **the Government** deprived Arkansas of the right similarly to strengthen and raise

its levee, expressly taking in addition a right to sacrifice even the existing levee. It is for the deliberate sacrificing of Arkansas and the deliberate taking of the common-law right to protection and deliberate taking of the right to sacrifice the existing levee in Arkansas that compensation is due.

The Government did allow compensation in the analogous New Madrid Spillway. It attempts to differentiate the New Madrid Spillway from the Boeuf River Spillway by saying that the New Madrid Levee was lowered five feet. It is immaterial whether the existing levees were lowered or were permitted to remain at their same strength and level. Indeed, it would have been immaterial if some increase in height and strength were allowed; the point is that, although it may not have deprived them of all rights, the Government deprived the landowners of the right to increase the height and strength of their levee to the point where lands other than their own would suffer from extreme flood and took the right to breach the existing levee.

For the most part the trial court in its opinion displayed such a grasp of the situation that the easiest way for these respondents to state their case is to refer to the trial court's opinion, accepting it in so far as it can be accepted, and pointing out its error. The view of these respondents is, of course, the view of the Court of Appeals.

There is no dispute between the Government and the appellants, and the trial court makes a correct finding on one point, to wit, landowners have a common-law and constitutional right to erect levees on their own land and to adopt any other methods of flood protection on their own land. This property right can be taken, even under the navigation power, only on payment of compensation. The trial court in its opinion errs in the finding that this right

had been impaired prior to the Flood Control Act and was not withdrawn or limited in the case of the Boeuf Basin by the Flood Control Act. The Court says:

> "The fuse plug section of the levee has not been disturbed, but plaintiff asserts that the landowner no longer has the same right to protect the levee that formerly existed. **The grade of this levee was established by the Mississippi River Commission, acting under authority duly conferred. The landowners prior to 1928 had no right to elevate the established grade. There is nothing in the act that restricts the privilege of property owners to participate in a flood fight by supporting the river front levee when it is in danger.** They did so participate during the 1927 flood."

The trial court completely misapprehended the function and authority of the Mississippi River Commission and the statements emphasized are the direct contrary of the fact. The Mississippi River Commission never had any authority to establish any levee grade. Its sole function was advisory. It had announced that in its judgment levees of certain grades and sections, the so-called 1914 grade and section, varying from place to place, would furnish complete flood protection. The grade and section of the Boeuf River Levee were fixed by the local levee board, which borrowed from the lien claimants to build the levee. The local levee board might have fixed any grade and section. The Mississippi River Commission standard levee was in no sense a maximum levee; it was a minimum levee. Even as a minimum levee it was without authority of law except as a recommendation. The most emphatically worded provision of the Jadwin Plan is one that does restrict the privilege of property owners of participating in a flood fight. In 1937 the landowners were permitted to participate in a flood fight to maintain their levee at the 1914 grade and section—there were places not up to that grade

and section and it was determined that the particular flood crest then imminent would not endanger the adjoining higher levees—but had other levees been threatened the Government would have gone even to the extreme of blowing the Boeuf Levee. The critical point is that the Government took charge of the "fuse plug" and dictated what might and what might not be done.

The market value of this land is always relatively low because of the flood hazard. If land as productive as this were located as Northern Illinois and Iowa land is located, it would be selling at $400.00 or $500.00 an acre. The inevitable flood hazard is that any levee may crevasse, no matter what precautions are taken, and this danger has been, and, for that matter, still is, uniform over the whole of the alluvial basin. However, it is perfectly logical that the market value of lands in the Boeuf Basin dropped to nothing when all the knowledge and resources of the Federal Government were put into a plan to insure that it would be the Boeuf Basin and no other area in the middle river that was flooded. Only a small fraction of the total tillable area protected by levees is actually tilled, and the plan to sacrifice the Boeuf Basin for the rest quite naturally drives landowners from the Boeuf Basin to the other territory with a total loss of market value in the Boeuf Basin, and, probably, with no appreciable increase in the market value in the rest of the area.

It is immaterial whether or not the Government feels that the situation is logical. It is immaterial whether it is due to a true or false estimate of the future. It is immaterial whether it is due to physical or to psychological factors. It is immaterial whether the Government says that buyers' refusal to buy is due to craven fear or to a laudable determination that their families shall take no risks of drowning. It is also immaterial that a market value may some day return because new methods of flood con-

trol may be discovered which will eliminate the hazard or because the new generation, which knew not the flood of 1927, may overlook it. It is also immaterial that the taking occurred at the peak of high prices, and that the depression within a year and a half went a long way toward temporarily taking away the market value of all lands.

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P. 3

SUPREME COURT OF THE UNITED STATES.

No. 72.—October Term, 1939.

United States of America, Petitioner,
vs.
Mrs. Julia Caroline Sponenbarger, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 4, 1939.]

Mr. Justice Black delivered the opinion of the Court.

Respondent sued the United States under the Tucker Act,[1] alleging that the Mississippi Flood Control Act of 1928[2] and construction contemplated by that Act involved an "intentional, additional, occasional flooding, damaging and destroying" of her land located in Desha County, Arkansas. She maintained that her property had thus been taken for a public use for which the Government is required to pay just compensation by the Fifth Amendment.[3] In addition, she asserted a statutory right of recovery under the Act itself. After full hearing, judgment for the Government was entered in the District Court.[4] The Circuit Court of Appeals reversed.[5] Because of the importance of both the legislation and the principles involved, we granted certiorari.[6]

A summary of the history behind the Mississippi Flood Control Act of 1928 clarifies the issues here. Respondent's land is in the alluvial valley of the Mississippi River. Alluvial soil, rich in fertility, results from deposits of mud and accumulations produced by floods or flowing water. Thus, floods have generously contributed to the fertility of the valley. However, the floods that have given fertility have with relentless certainty undermined the security of life and property. And occupation of the alluvial valley of the Mississippi has always been subject to this constant hazard.

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1 28 U. S. C. 41(20).

2 c. 569, 45 Stat. 534; 33 U. S. C. 702(a).

3 Cf. Jacobs v. United States, 290 U. S. 13, 16.

4 21 Fed. Supp. 28.

5 101 Fed. (2d) 506.

6 — U. S. —. Respondent primarily claims that governmental operations under the Flood Control Act have resulted in taking for public use her lands lying in the proposed Boeuf Floodway. This Floodway was originally intended to cover a vast area roughly fifteen miles wide and one hundred and twenty-five miles long.

To enjoy the promise of its fertile soil in safety has, for generations, been the ambition of the valley's occupants. As early as 1717, small levees were erected in the vicinity of New Orleans. Until 1883, piecemeal flood protection for separate areas was attempted through uncoordinated efforts of individuals, communities, counties, districts and States. Experience demonstrated that these disconnected levees were utterly incapable of safeguarding an ever increasing people drawn to the fertile valley. Under what was called the Eads plan, the United States about 1883 undertook to cooperate with, and to coordinate the efforts of the people and authorities of the various river localities in order to effect a continuous line of levees along both banks of the Mississippi for roughly nine hundred and fifty miles—from Cape Girardeau, Missouri, to the Gulf of Mexico.[7] Recurrent floods, even after the eventual completion of this tremendous undertaking, led to the conclusion that levees alone, though continuous, would not protect the valley from floods. And in 1927 there occurred the most disastrous of all recorded floods. In congressional discussion of the 1928 Act, it was said — as the evidence here discloses — that "There were stretches of country [in Arkansas] miles in width and miles in length in which . . . every house, every barn, every outbuilding of every nature, even the fences, were swept away. It was as desolate as this earth was when the flood subsided."[8] Respondent's land, under fifteen to twenty feet of water, was left bare of buildings of any kind in this 1927 flood.

The 1928 Act here involved accepted the conception—underlying the plan of General Jadwin of the Army Engineers—that levees alone would not protect the valley from floods. Upon the assumption that there might be floods of such proportions as to overtop the river's banks and levees despite all the Government could do, this plan was designed to limit to predetermined points such escapes of floodwaters from the main channel. The height of the levees at these predetermined points was not to be raised to the general height of the levees along the river. These lower points for possible flood spillways were designated "fuse plug levees." Flood waters diverted over these lower "fuse plug levees" were intended to relieve the main river channel and thereby prevent general flooding over the higher levees along the banks. Additional "guide levees" were to be constructed to confine the diverted flood waters

[7] For the background of this legislation, see Jackson v. United States, 230 U. S. 1.

[8] 69 Cong. Rec., Part 8, p. 8191.

within limited floodway channels leading from the fuse plugs. The suggested fuse plug which respondent claims would damage her property was to be at Cypress Creek, within two to two and one-half miles of her land, and her land lies in the path of the proposed floodway to stem from this particular fuse plug.

The 1928 Act provided for a comprehensive ten-year program for the entire valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds. However, before any part of this program was actually to be carried out, the Act required extensive surveys "to ascertain the best method of securing flood relief in addition to levees, before any flood control works other than levees and revetments are undertaken." Lands intended for floodways were, pending completion of the floodways, to enjoy the protection already afforded by levees.

The District Court found—

> Respondent's land lies in that part of the Boeuf Basin which the plan of the 1928 Act contemplated as a diversion channel or floodway. This Basin has always been a natural floodway for waters from the Mississippi,[9] and respondent's lands, and other lands similarly situated, have been repeatedly overflowed by deep water despite the presence of strong levees.[10] The United States has not caused any excessive flood waters to be diverted from the Mississippi through the proposed Boeuf fuse plug (at Cypress Creek) or floodway, and respondent's property has not been subjected to any servitude from excessive flood-waters, which did not already exist before 1928. She still enjoys the same benefits from the Cypress Creek drainage system as when it was created before 1928, and the government program has not "in any wise, nor to any extent increased the flood hazard thereto." No work was ever commenced or done within the area of the proposed Boeuf floodway, and the fuse plug heading into it was never established. This floodway as a whole has been abandoned and the Eudora floodway substituted. However, work done under the 1928 Act has shortened the river by cut-offs and dredging and the river has been lowered five or six feet, with the greatest improvement in the vicinity of the proposed fuse plug. Levee protection to lands such as plaintiff's has not been reduced. In fact, plaintiff's land has been afforded additional protection by virtue of the fact that this government improvement program has materially

[9] This Basin also was found to be a floodway for waters from the Arkansas and Red Rivers.

[10] Her lands were found to have been flooded in 1912, 1913, 1919, 1921, 1922, 1927.

"Flat" (White)

reduced the crest of the river at all times, including flood crests, and her land has also been protected by the Government's reconstruction of levees on the Arkansas River pursuant to its general program. In 1935, her property would have been flooded but for the work done by the Government which has kept her land free of overflow since 1928. Lands, such as respondent's, located immediately behind levees along the main stem of the Mississippi, are liable to be inundated and destroyed by the breaking of river front levees and from natural crevassing, regardless of the height and strength of the levee. Loss in market value of respondent's property, since 1927, has not been caused by any action of the Government, but is due to the flood of 1927, the depression and other causes unconnected with the governmental program under the 1928 Act. The United States has in no way molested respondent's possession or interfered with her right of ownership. She has remained in uninterrupted possession of her property operating it as a farm and borrowing money upon it as security.

From these findings the District Court concluded as a matter of law that—

(1) Respondent's property had not been taken within the meaning of the constitutional prohibition against taking without compensation;

(2) Under the facts of this case, respondent had no statutory right of recovery under the 1928 Act itself.

In reversing the District Court's judgment, the Circuit Court of Appeals decided that the Boeuf floodway had not been abandoned by the Government, but was in operative existence notwithstanding that the proposed guide levees along the floodway had not been built and levees on the Mississippi both immediately above and below the proposed fuse plug had not been raised above the height of what would have been the fuse plug levee. The Circuit Court of Appeals said that "By the provisions of this plan of flood control . . . [respondent's land] is subjected to a planned and practically certain overflow in case of the major floods contemplated and described. No one can foretell when such may occur, but that is the only remaining uncertainty. . . . If, and when, such floods do occur, serious destruction must be conceded." Upon these conclusions, the Circuit Court held that there was a taking of respondent's property.

First. This record amply supports the District Court's finding that the program of improvement under the 1928 Act had not increased the immemorial danger of unpredictable major floods to which respondent's land had always been subject. Therefore, to hold the

Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods, even though the same floods and the same damages would occur had the Government undertaken no work of any kind. So to hold would far exceed even the "extremest"[11] conception of a "taking" by flooding within the meaning of that Amendment. For the Government would thereby be required to compensate a private property owner for flood damages which it in no way caused.

An undertaking by the Government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect. In the very nature of things the degree of flood protection to be afforded must vary. And it is obviously more difficult to protect lands located where natural overflows or spillways have produced natural floodways.

The extent of swamps and overflowed lands in the Boeuf floodway and the history of recurrent floods that have passed through it, support the District Court's finding that the proposed Boeuf floodway is a naturally created floodway. And the Government's problem was by channel stabilization, dredging, cut-offs or any effective means, to prevent diversions from the Mississippi at all points if possible. But if all diversions could not be prevented, the Government sought to limit the flooding to the least possible number of natural spillways heading into natural floodways. If major floods may sometime in the future overrun the river's banks despite—not because of—the Government's best efforts, the Government has not taken respondent's property. And this is true, although other property may be the beneficiary of the project. The Government has not subjected respondent's land to any additional flooding, above what would occur if the Government had not acted; and the Fifth Amendment does not make the Government an insurer that the evil of floods be stamped out universally before the evil can be attacked at all.

The far reaching benefits which respondent's land enjoys from the Government's entire program precludes a holding that her property has been taken because of the bare possibility that some future

[11] Cf. Transportation Co. v. Chicago, 99 U. S. 635, 642; Pumpelly v. Green Bay Co., 13 Wall. 166.

major flood might cause more water to run over her land at a greater velocity than the 1927 flood which submerged it to a depth of fifteen or twenty feet and swept it clear of buildings. Enforcement of a broad flood control program does not involve a taking merely because it will result in an increase in the volume or velocity of otherwise inevitably destructive floods, where the program measured in its entirety greatly reduces the general flood hazards, and actually is highly beneficial to a particular tract of land.

The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner. But if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner. While this Court has found a taking when the Government directly subjected land to permanent intermittent floods to an owner's damage,[12] it has never held that the Government takes an owner's land by a flood program that does little injury in comparison with far greater benefits conferred.[13] And here, the District Court justifiably found that the program of the 1928 Act has greatly reduced the flood menace to respondent's land by improving her protection from floods. Under these circumstances, respondent's land has not been taken within the meaning of the Fifth Amendment.

Second. Even though the Government has not interfered with respondent's possession and as yet has caused no flooding of her land,[14] respondent claims her property was taken when the 1928 Act went into effect and work began on its ten-year program because the Act itself involves an imposition of a servitude for the purpose of intentional future flooding of the proposed Boeuf floodway. But, assuming for purposes of argument that it might be shown that such supposed future flooding would inflict damages greater than all benefits received by respondent, still this contention amounts to no more than the claim that respondent's land was taken when the statutory plan gave rise to an apprehension of future flooding. This apprehended flooding might never occur for many reasons—one of which is that the Boeuf floodway might never

[12] Jacobs v. United States, *supra*; U. S. v. Cress, 243 U. S. 316; U. S. v. Lynah, 188 U. S. 445; Pumpelly v. Green Bay Co., *supra*; *cf.* Sanguinetti v. U. S., 264 U. S. 146.

[13] Cf. Bauman v. Ross, 167 U. S. 548, 574.

[14] Cf. Marion & R. Valley R. Co. v. United States, 270 U. S. 280, 282, 283.

be begun or completed. As previously pointed out, the Act directed comprehensive surveys before utilization of any means of flood control other than levees and revetments. In general language it adopted a program recommended by the Chief of Army Engineers, but Congress did not sweep into the statute every suggestion contained in that recommendation.

Since it envisaged a vast program, the Act naturally left much to the discretion of its administrators and future decisions of Congress.[15] Recognizing the value of experience in flood control, Congress and the sponsors of the Act did not intend it to foreclose the possibility of changing the program's details as trial and error might demand.

Here, it is clear that those charged with execution of the program of the 1928 Act abandoned the proposed Boeuf floodway and substituted another. Whatever the original general purpose of Congress as to that floodway and its fuse plug at Cypress Creek, congressional hearings, reports and legislation have approved their abandonment. Thus, respondent's contention at most is that the Government should pay for land which might have been in a floodway if that floodway had not been abandoned. We think this contention without merit.[16]

Third. Respondent's "right of self defense" against floods through locally built levees has not been taken away. The 1928 Act does not represent a self-executing assumption of complete control over all levees to the exclusion of the States and local authorities. Respondent's argument that it does rests upon Section 9 of the Act making Section 14 of the Act of March 3, 1899 (33 U. S. C. 408), which forbids interference with levees, "applicable to all lands, waters, easements and other property and rights acquired or constructed under the provisions of this [1928] Act." But Section 14 of the 1899 Act relates only to levees and other structures "built by the United States," and no local levees on which respondent could rely have as yet been "built by the United States" or "acquired . . . under the provisions of" the 1928 Act. In fact, a proposal that the Government assume control of local levees appeared in the original draft of the 1928 Act but was stricken out by amendment.[17] And the War Department, charged with its ad-

[15] Cf. South Carolina v. Georgia, et al., 93 U. S. 4, 13. As to when legislation does not constitute self-executing appropriation, see Bauman v. Ross, 167 U. S. 548, 596-7; Willink v. U. S., 240 U. S. 572.

[16] Whether recovery at law could be had upon a similar contention was left open by Hurley v. Kincaid, 285 U. S. 95. Cf. Peabody v. United States, 231 U. S. 530, 539, 540.

[17] 69 Cong. Rec., Part 7, pp. 7114, 7115.

ministration, has treated the Act as leaving local interests free to raise proposed fuse plug levees if they wish.[18]

Fourth. It is argued that the 1928 Act itself requires judgment for respondent even though her property was not "taken" within the Fifth Amendment. The pertinent provisions are—

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.
>
> " . . . . . The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: . . . . "

This Court has previously decided that "the construction of levees on the opposite" bank of the Mississippi River which resulted in permanently flooding property across the river did not amount to a "taking" of the flooded area within the Fifth Amendment.[19] We need not here determine whether the provisions of the 1928 Act would themselves grant a statutory right to recover if respondent's land had been damaged as a result of levees constructed on the river's opposite bank. For Section 4 of the Act contains the further specific reservation "That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid." On this record it is clear that respondent's lands were not damaged, but actually benefited.

We do not find it necessary to discuss other questions presented.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Reversed.

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[18] Com. Doc. No. 2, House Committee on Flood Control, 71st Cong., 1st Sess.

[19] Jackson v. United States, *supra*, 22, 23.